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Seventh report on reservations to treaties

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Chapter II

Withdrawal and modification of reservations and interpretative declarations

61. Although the 1969 and 1986 Vienna Conventions devote several provisions to the withdrawal of reservations, they are silent regarding modifications that may be made to an earlier reservation. It is true that there are objections to such a procedure that seem, at first sight, difficult to surmount: unless the treaty provides otherwise, the times at which a reservation may be formulated are fixed in a precise manner by the provisions of the two Conventions defining reservations,[104] and no modification can be accepted, at least if it amounts to a new reservation. The case is different, however, if the modification can be seen as a partial withdrawal of the reservation. It would therefore be desirable first to clarify the rules applicable to the withdrawal of reservations before considering the rules which might apply to modifications of reservations, and which come under the heading of the progressive development of international law rather than its codification in the strict sense.

62. The same is true *a fortiori* with regard to withdrawal and modification of interpretative declarations, on which the Vienna Conventions are completely silent.[105] In line with the method followed in the preparation of earlier reports, the rules applicable, *de lege lata* or *de lege ferenda*, to withdrawal or modification of these legal instruments will be studied in the light of the rules relating to reservations and of practice, where it exists.

A. Withdrawal of reservations

1. The form and procedure for withdrawal of reservations

63. Withdrawal of reservations, formerly unusual,[106] is today more frequent.[107] The increased recourse made to this possibility is largely due, firstly, to the accession of many States to independence, which has resulted in their reviewing reservations formulated by the predecessor States,[108] and, secondly and above all, to the change in political regime in the Eastern European countries, which have withdrawn quite a large number of reservations made at the time of the Communist

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[104] Cf. article 2, paragraph 1 (d), in the two Conventions and draft guideline 1.1 of the Guide to Practice. See also draft guidelines 1.1.2, 1.1.4 and 2.3.1 to 2.3.4; regarding interpretative declarations, see draft guidelines 2.4.3, 2.4.6 and 2.4.7. All the draft guidelines already adopted by the Commission or proposed by the Special Rapporteur are reproduced in the annex to this report (A/CN.4/526/Add.4), which also refers, as applicable, to the Commission's commentaries or to the Special Rapporteur's reports introducing the draft guidelines.

[105] See the first and third reports on reservations to treaties (A/CN.4/470, paras. 128-129, and A/CN.4/491/Add.4, paras. 236-313).

[106] See in this regard Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, pp. 291-293, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague, 1988, p. 226.

[107] Cf. Luigi Migliorino, "La revoca di riserve e di obiezioni a riserve", *Rivista di diritto internazionale*, 1994, p. 315.

[108] See footnote 156 below.

regimes, notably with regard to human rights or the submission of disputes to the International Court of Justice.[109]

64. Provisions of the 1969 and 1986 Vienna Conventions[110] directly concern the withdrawal of reservations. According to article 22:

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.
>
> ...
>
> "3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> "(a) The withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization."

According to article 23, paragraph 4:

> "The withdrawal of any reservation or of an objection to a reservation must be formulated in writing."

65. These provisions give precise indications with regard to:

- The form of the withdrawal;
- The time at which it may be made;
- The lack of acceptance on the part of the other parties; and
- The time at which it takes effect.

By contrast, they make no reference to:

- The procedure to be followed, by the notifying State or others; and
- The effect of the withdrawal.

66. For the sake of simplicity, (a) the form of a withdrawal and the procedure governing it will be considered separately from (b) the effects of the withdrawal. The *travaux préparatoires* of the provisions cited above will be discussed at the same time.

(a) Form of withdrawal of reservations

(i) *A written unilateral act—Articles 22, paragraph 1, and 23, paragraph 4, of the Vienna Conventions*

67. It follows from the provisions of article 22, paragraph 1, of the Vienna Conventions[111] that the withdrawal of a reservation is a unilateral act. This

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[109] See, for example, L. Migliorino, op cit. (footnote 107), or Philippe Bretton, "L'URSS et la compétence de la Cour international de Justice en matière de protection des droits de l'homme", *Annuaire Français de Droit*, 1989, pp. 261-275.

[110] As a general rule, as with earlier reports, it is best to use the text of the 1986 Convention, which reproduces the 1969 text but extends it to treaties concluded by international organizations.

[111] See para. 64 above.

conclusion settled a controversy that was long a subject of heated debate among legal theorists as to the legal nature of a withdrawal: is it a unilateral decision or an act under a treaty?[112] This divergence of views played a perceptible if understated role in the *travaux préparatoires* for this provision.

68. The question of the withdrawal of reservations did not attract the attention of Special Rapporteurs on the law of treaties until fairly recently and even then to a limited degree. Brierly and Sir Hersch Lauterpacht did not devote a single draft article to the question of the criterion for the admissibility of reservations. The furthest the latter went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the "Covenant of Human Rights", expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations to that effect.[113] Sir Gerald Fitzmaurice may have had that precedent in mind when, in his first report, in 1956, he proposed the following wording for draft article 40, paragraph 3:

> "A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties."[114]

69. The draft was not discussed by the Commission, but, in his first report, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled "Power to formulate and withdraw reservations", which posited the principle of the "absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States".[115] Paragraph 6 of this draft article states:

> "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty."[116]

70. This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording but even to the substance: the new draft article 19, which dealt exclusively with "The withdrawal of reservations", no longer mentioned the notification procedure

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[112] On this disagreement on the theory, see particularly P. H. Imbert, op. cit. (footnote 106), p. 288, or F. Horn, op. cit. (footnote 106), pp. 223-224 and the accompanying references. It would not appear to be useful to quote verbatim from the parties to a disagreement that no longer exists.

[113] Second report on the law of treaties, A/CN.4/87, para. 7; *Yearbook ... 1954*, vol. II, pp. 131-132.

[114] *Yearbook ... 1956*, vol. II, p. 116, document A/CN.4/101. In his commentary on this provision, Sir Gerald Fitzmaurice restricted himself to saying that it did not require any explanation (ibid., p. 131, para. 101).

[115] *Yearbook ... 1962*, vol. II, p. 66, document A/CN.4/144, para. 12 of the commentary on draft article 17.

[116] Ibid., p. 61.

but included a paragraph 2 relating to the effect of a withdrawal.[117] This draft was adopted with the addition of a provision in the first paragraph, at the request of Bartoš,[118] specifying when a withdrawal took legal effect.[119] According to draft article 22 at first reading:

> "1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.
>
> "2. Upon withdrawal of a reservation the provisions of article 21 cease to apply."[120]

71. Paragraph 1 of the commentary on these provisions, which focuses on the unilateral nature of the withdrawal, probably reflects the discussions in the Drafting Committee. It states:

> "It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a regime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted."[121]

72. Only three States reacted to draft article 22,[122] which was consequently revised by the Special Rapporteur. He proposed that[123]

- The provision should take the form of a residuary rule;
- It should be specified that notification of a withdrawal should be made by the depositary, if there was one;
- A period of grace should be allowed before the withdrawal became operative.[124]

73. During consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another

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[117] *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67.

[118] Ibid., paras. 68-71.

[119] Ibid., 667th meeting, 25 June 1962, p. 253, paras. 73-75.

[120] *Yearbook ... 1962*, vol. II, p. 181, document A/5209; article 21 related to "The application of reservations".

[121] Ibid., pp. 181-182, para. 1 of the commentary to art. 22.

[122] Fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the "provision that the withdrawal of the reservation 'takes effect when notice of it has been received by the other States concerned'"; the comment by the United Kingdom of Great Britain and Northern Ireland related to the effective date of the withdrawal; see paras. 116 and 157 below. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, pp. 351 (United States), 295 (Israel, para. 14) and 344 (United Kingdom).

[123] For the text of the draft article proposed by Waldock, see ibid., p. 56, or *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 43.

[124] On this point, see para. 157 below.

State, an agreement existed between those two States.[125] This proposition received little support and the majority favoured the notion, expressed by Bartoš, that "normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated".[126]

74. Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.[127] The new text was the one eventually adopted[128] and it became the final version of draft article 20 ("Withdrawal of reservations"):

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
>
> "2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States."[129]

75. The commentary on the provision was, apart from a few clarifications, a repetition of that of 1962.[130] The Commission expressed the view that the parties to the treaty "ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty".[131]

76. At the Vienna Conference, the text of this draft article (which had by now become article 22 of the Convention) was incorporated unchanged in article 20 of the Convention, although several amendments of detail had been proposed.[132] However, on the proposal of Hungary, two important additions were adopted:

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[125] See the comments by Verdross and (less clearly) Amado, 800th meeting, 11 June 1965, p. 175, para. 49, and p. 176, para. 60.

[126] Ibid., p. 175, para. 50.

[127] See para. 70 above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22.

[128] See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56-60 and *Yearbook ... 1966*, vol. I, Part Two, p. 327, para. 106.

[129] *Yearbook ... 1966*, vol. II, p. 209; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, p. 162).

[130] See para. 70 above.

[131] *Yearbook ... 1966*, vol. II, p. 209.

[132] See the list and the text of these amendments and sub-amendments in the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties, First and Second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 141-142, paras. 205-211. In its written commentary, Belgium expressed the opinion that "the consent of the State which has accepted the reservation would appear to be called for" for "withdrawal of reservations for which provision is not made in the treaty and which can take effect only with the express or tacit consent of the other signatory States" ("Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties", A/CONF.39/5 (vol. I), p. 166). Belgium does not seem, however, to have subsequently reverted to this suggestion.

- First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;[133] and,

- Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.

77. Several States made proposals to this effect,[134] with a view to bringing the provision "into line with article 18 [23, in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing."[135] Although K. Yasseen (Iraq) considered that "an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible,"[136] the principle was unanimously adopted by 98 votes to none.[137] It had, however, ultimately seemed more logical to include this provision not in article 20 itself but in article 23, which dealt with "Procedure regarding reservations" in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.[138]

78. Basing himself on the principle that "there is no reason to put international organizations in a situation different from that of States in the matter of reservations", Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting "draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention", subject only to "minor drafting changes".[139] So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.[140] These proposals were adopted

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[133] For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records* ..., op. cit. (footnote 132), p. 267; for the discussion of it, see the debates at the eleventh plenary meeting of the Conference (30 April 1969) in *Official Records of the United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 36-38, paras. 14-41.

[134] See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records* ..., op. cit. (footnote 132), pp. 141-142 and 267.

[135] Statement by Mrs. Bokor-Szegó (Hungary) in *Official Records* ..., op. cit. (footnote 133), p. 36, para. 13.

[136] Ibid., p. 38, para. 39.

[137] Ibid., para. 41.

[138] Ibid., 29th meeting, 19 May 1969, p. 159, paras. 10-13. See J. M. Ruda, "Reservations to Treaties", *Recueil des Cours de l'Académie de droit international de La Haye* (*RCADI*) 1975-III, vol. 146, p. 194. For a brief general presentation of the *travaux préparatoires* relating to articles 20 and 23, para. 4, see Luigi Migliorino, op. cit. (footnote 107), pp. 319-320.

[139] *Yearbook ... 1975*, vol. II, pp. 36 and 37, document A/CN.4/285, paras. (2) and (5) of the general commentary on section 2.

[140] Ibid., p. 38 and fifth report, *Yearbook ... 1976*, vol. II, Part One, p. 146.

by the Commission without amendment[141] and retained on second reading.[142] The 1986 Vienna Conference did not bring about any fundamental change.[143]

79. It appears from the *travaux préparatoires* of articles 22, paragraphs 1 and 3 (a), and 23, paragraph 4, of the 1969 and 1986 Conventions that these provisions were hardly questioned. Even the once deeply debated theoretical question[144] of the purely unilateral nature of the act of withdrawal gave rise to little debate, both in the Commission[145] and at the Vienna Conferences.[146] This would appear quite correct: by definition, a reservation is a unilateral[147] act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations;[148] but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateralism. It would therefore be illogical to require agreement from the other Contracting Parties to undo what the unilateral expression of the will of a State has done.

80. It could, perhaps, be argued that, in accordance with article 20 of the Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation—it gives effect to it, but the reservation is still a distinct unilateral act—and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,[149] the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,[150] is never forbidden under a treaty.[151]

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[141] See the Commission's discussions in 1977: 1434th meeting, 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 100-101, paras. 30-34; 1435th meeting, 7 June 1977, ibid., p. 103, paras. 1 and 2; 1451st meeting, 1 July 1977, ibid., pp. 194-195, paras. 12-16; and the report of the Commission, *Yearbook ... 1977*, vol. II, Part Two, pp. 114-115.

[142] States and international organizations made no comment on these provisions. See the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, pp. 63-64; the Commission's discussions: 1652nd meeting, 15 May 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-29; 1692nd meeting, 16 July 1981, ibid., pp. 264-265, paras. 38-41; the report of the Commission, *Yearbook ... 1981*, vol. II, Part Two, p. 140; and the final report for 1982, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

[143] See *Official Records of the United Nations Conference on the Law of Treaties between States and international organizations or between international organizations, Vienna*, 18 February-21 March 1986, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62-63. For the final text, see para. 64 above.

[144] See para. 67 above.

[145] See footnotes 125 and 126 above.

[146] See the comments by Belgium, footnote 132 above.

[147] Cf. article 2, paragraph 1 (d), of the Vienna Conventions and draft guideline 1.1 of the Guide to Practice.

[148] Cf. draft guideline 1.7.1.

[149] See para. 73 above.

[150] See especially paras. 147 or 163 below.

[151] Cf. L. Migliorino, op. cit. (footnote 107), p. 319.

81. Furthermore, to the best of the Special Rapporteur's knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission's questionnaire on reservations[152] has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,[153] or aim to encourage withdrawal by urging States to withdrawal them "as soon as circumstances permit".[154] In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.[155]

82. Such exhortations also confirm that the withdrawal of a reservation may take place "at any time",[156] which could even mean before the entry into a treaty by a State which withdraws a previous reservation,[157] although the Special Rapporteur knows of no case in which this has occurred.[158]

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[152] See footnotes 25 and 26 above. See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

[153] See the examples given by P. H. Imbert, op. cit. (footnote 106), p. 287, note 19, or by F. Horn, op. cit. (footnote 106), p. 437, note 1. See also, for example, the Convention relating to the Status of Refugees, of 28 July 1951, article 42, para. 2; the Convention on the Continental Shelf, of 29 April 1958, article 12, para. 1; the European Convention on Establishment, of 13 December 1955, article 26, para. 3; or the 1962 model clause of the Council of Europe, which appears in "Models of final clauses", given in a Memorandum of the Secretariat (CM (62) 148, 13 July 1962, pp. 6 and 10).

[154] See, for example, the European Patent Convention (Munich Convention) of 5 October 1973, article 167, para. 4, and other examples cited by P. H. Imbert, op. cit. (footnote 106), p. 287, note 20, or by F. Horn, op. cit. (footnote 106), p. 437, note 2.

[155] For recent examples, see, among others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Human Rights Treaties (para. 7); 54/137 of 17 December 1999 and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 5); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Subcommission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

[156] One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (cf. the 1978 Vienna Convention on Succession of States in respect of Treaties, article 20, para. 1). However, in accordance with the general plan followed in drafting the Guide to Practice (see para. 18 above), this situation will be examined during the general consideration of the fate of reservations in the case of succession of States.

[157] This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol and the Customs Convention on the Temporary Importation of Private Road Vehicles, all of 4 June 1954 (para. 5); see *Yearbook ... 1965*, vol. II, p. 105, document A/5687, Part Two, annex II, para. 2. On the other hand, there is a considerable number of cases in which a State has made a reservation on signing a treaty but subsequently renounced it because of representations made either by other signatories or by the

83. Otherwise, the now customary nature of the rules contained in article 22, paragraph 1, and 23, paragraph 4, seems not to be in question[159] and is in line with current practice.[160]

84. In these circumstances, there seems no reason not to incorporate in the Guide to Practice the provisions under consideration, in accordance with the Commission's decision in principle that there would have to be decisive reasons to depart, in the Guide to Practice, from the provisions of the Vienna Conventions with regard to reservations.[161]

85. Draft guideline 2.5.1 (which would be the first to appear in section 2.5 relating to the withdrawal and modification of reservations and interpretative declarations) could therefore adopt without change the wording of the 1986 Vienna Convention, article 22, paragraph 1:

> ***2.5*** *Withdrawal and modification of reservations and interpretative declarations*
>
> ***2.5.1*** *Withdrawal of reservations*
>
> *Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.*

86. This wording does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty otherwise provides ..."). It goes without saying that most of the provisions of the Vienna Convention, and all the rules of a procedural nature contained in it, are of a residuary, voluntary nature and must be understood to apply "unless the treaty otherwise provides". The same must therefore be true, *a fortiori*, of the Guide to Practice.

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depositary (cf. the examples given by F. Horn, op. cit. (footnote 106), pp. 345-346); but these are not strictly speaking withdrawals: see paras. 94-95 below.

[158] On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia's reply to question 1.6.2.1 of the Commission's questionnaire: the restrictions on its acceptance of annexes III-V of the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL Convention) (as modified by its Protocol of 1978), to which it had acceded on 2 December 1991, had been lifted on 28 July 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the 1959 Agreement Establishing the Inter-American Development Bank. See also L. Migliorino, op. cit. (footnote 107), p. 322, although in the examples he gives several years elapsed between the making and the withdrawing of the reservation.

[159] Cf. L. Migliorino, op. cit. (footnote 107), pp. 320-321, or Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 313.

[160] Cf. the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations, 1997, ST/LEG/8, Sales No.E.94.V.15, p. 64, para. 216. The few States who made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux" (*AFDI*), 1986, pp. 860-861.

[161] See paras. 16, 31 and 32 above.

87. The phrase, which appeared in the Commission's final draft but not in that of 1962,[162] was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by governments,[163] and endorsed by the Drafting Committee at the seventeenth session in 1965.[164] The reference to treaty provisions seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of the Commission and some governments about difficulties that might arise from the sudden withdrawal of a reservation.[165] Model clauses to meet these concerns are presented below, in the section relating to the effective date of a withdrawal.[166]

88. Similarly, there seems no reason not to include in the Guide to Practice a draft guideline reproducing the wording of article 23, paragraph 4, which is worded identically in both the 1969 and the 1986 Vienna Conventions.

89. Yasseen was doubtless correct, at the 1969 Conference, to emphasize that the withdrawal procedure "should be facilitated as much as possible".[167] The burden imposed on a State by the requirement of a written withdrawal should not, however, be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,[168] it would be incongruous if a reservation,[169] about which there can surely be no doubt that it should be in writing, could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation but would not necessarily have been made aware of its withdrawal.[170]

90. Draft guideline 2.5.2 can, therefore, safely follow the text of article 23, paragraph 4, of both the Vienna Conventions on the Law of Treaties, at least insofar as the withdrawal of reservations is concerned; according to the plan for this part of the Guide to Practice, objections to reservations will form the subject of a separate section:

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

(ii) *The question of implicit withdrawals*

91. It remains open to question whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

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[162] See paras. 70 and 74 above.

[163] Fourth report on the law of treaties, *Yearbook .... 1965*, vol. II, pp. 55-56; see also ibid., vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[164] Ibid., 814th meeting, 29 June 1965, p. 272, para. 22.

[165] See para. 157 below.

[166] See paras. 164 and 166 below.

[167] See para. 77 above.

[168] See para. 119 below.

[169] See draft guideline 2.1.2 proposed by the Special Rapporteur and the explanations contained in the sixth report, A/CN.4/518/Add.1, paras. 40-52.

[170] In this connection, see J. M. Ruda, op. cit. (footnote 138), pp. 195-196.

92. Certainly, as Ruda points out, "the withdrawal of a reservation ... is not to be presumed".[171] Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

93. It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.[172] The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, acceded also to the first, the impact of the reservation would be fully felt in that State's relations with the reserving State.

94. Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,[173] cannot be interpreted as being a withdrawal of the reservation, which may well have been "formulated" but, for lack of formal confirmation, has not been "made" or "established".[174] The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

95. Professor Imbert argues against this reasoning, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the Conventions on the Law of Treaties; and, under article 23, paragraph 3, "an express acceptance or an objection does not need to be renewed if made before confirmation of the reservation"[175] (une acceptation expresse ou une objection n'ont pas besoin d'être renouvelées si elles sont antérieures à la confirmation de la réserve). The distinguished writer goes on to say that:

> "Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State

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[171] Ibid., p. 196.

[172] In this connection, see J. F. Flauss, op. cit. (footnote 160), pp. 857-858; but see also F. Tiberghien, *La protection des réfugiés en France*, Économica, Paris, 1984, pp. 34-35 (quoted by Flauss, p. 858, note 8).

[173] Cf. the 1969 and 1986 Vienna Conventions, art. 23, para. 2, and draft guideline 2.2.1 and the commentary to it in the report of the Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), pp. 464-472.

[174] Non-confirmation is, however, sometimes (wrongly) called "withdrawal"; cf. *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5, vol. I, p. 376, note 16, relating to the non-confirmation by the Indonesian Government of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

[175] Op. cit. (footnote 106), p. 286

are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view."[176]

([L]orsqu'une réserve n'est pas renouvelée [confirmée], expressément ou non, aucun changement n'apparaît, ni pour l'État réservataire lui-même, ni dans ses relations avec les autres parties, puisque jusqu'à ce moment-là il n'était pas lié par le traité. Au contraire, si le retrait intervient après le dépôt de l'instrument de ratification ou d'adhésion, les obligations de l'État réservataire sont accrues dans la mesure de la réserve et cet État peut être pour la première fois lié par le traité avec certaines parties qui avaient fait objection à sa réserve. Un tel retrait modifie donc l'application du traité alors que la non-confirmation n'a, de ce point de vue, aucune influence.)

The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

96. It would even seem impossible to consider that an expired reservation has been withdrawn.

97. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations. Thus, for example, the Council of Europe Convention on the Unification of Certain Points of Substantive Law on Patents for Invention of 1963 provides for the possibility of non-renewable reservations for maximum periods of five or 10 years on some of its provisions, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles of 1973 allows Belgium to make a ("negotiated"[177]) reservation for a three-year period starting at the entry into force of the Convention.[178] Other Council of Europe conventions authorize only temporary but renewable reservations; examples include the Conventions on the Adoption of Children, of 24 April 1967, and the Legal Status of Children Born out of Wedlock, of 15 October 1975:

"... A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.

"... Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraphs by means of a

[176] Ibid.; footnote omitted.

[177] See the fifth report on reservations to treaties, A/CN.4/508/Add.1, paras. 164-170.

[178] See also the examples given by Sia Spiliopoulou Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *International and Comparative Law Quarterly* (*ICLQ*), 1999, pp. 499-500 or P. H. Imbert, op. cit. (footnote 106), p. 287, note 21; also article 124 of the Rome Statute of the International Criminal Court of 17 July 1998, which sets a seven-year time limit on the possibility of non-acceptance of the Court's competence in respect of war crimes.

declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt."[179]

98. This provision makes a very clear distinction between the *withdrawal* of a reservation, mentioned in the second paragraph, and its *expiration* in cases of non-renewal, which is the subject of the first paragraph. This distinction is current: whereas withdrawal is a unilateral act expressing the will of the reserving State, expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time.

99. The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the question on reservations,[180] Estonia stated that it had limited its reservation to the European Convention on Human Rights to one year, since "one year is considered to be a sufficient period to amend the laws in question".[181] In this case, the reservation ceases to be in force not because it has been withdrawn but because of the time limit set by the text of the reservation itself.

100. A more awkward situation arises in connection with what have been termed "forgotten reservations".[182] A reservation is "forgotten", in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. Professor Flauss, who gives several examples of this in relation to France,[183] considers, no doubt correctly, although a full assessment is impossible, that "the number of 'forgotten' reservations ... is undoubtedly by no means negligible" (le nombre des réserves "oubliées" ne peut ... être tenu pour quantité négligeable).[184]

101. This situation, which is doubtless generally the product of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to total legal chaos, particularly in States with a tradition of legal monism:[185] judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws,

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[179] The implementation of these provisions has caused great difficulties, owing to the insistence by certain States which had omitted to renew their reservations within the time limit on reformulating them. Eventually, the procedure applicable to the late formulation of reservations (cf. draft guideline 2.3.1) was implemented without opposition; cf. Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe, 1999, pp. 101-102. To avoid such problems, the Criminal Law Convention on Corruption of 1999, article 38, para. 2, states that failure to renew a reservation would cause it to lapse.

[180] Replies to questions 1.6 and 1.6.1.

[181] Jörg Polakiewicz (op. cit. (footnote 179), pp. 102-104) gives many similar examples. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (cf. the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, *Multilateral Treaties* ..., op. cit. (footnote 174), p. 234; see also the reservations by Barbados to the International Covenant on Civil and Political Rights, ibid., vol. I, p. 162).

[182] J. F. Flauss, op. cit. (footnote 160), p. 861, or F. Horn, op. cit. (footnote 106), p. 223.

[183] J. F. Flauss, op. cit. (footnote 160), pp. 861-862.

[184] Ibid., p. 861.

[185] The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent *domestic* law.

even if the latter were adopted later.[186] The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. Moreover, since domestic laws are "merely facts" from the standpoint of international law,[187] whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at international level, will continue, in principle, to be fully effective and the reserving State will continue to have an advantage over the other parties, although such an attitude could be questionable in terms of the principle of good faith,[188] the scope of which, however, is still uncertain.

102. In these circumstances, it is worth considering whether it would not be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that have become obsolete or superfluous.

103. The Special Rapporteur confesses that he is uncertain on this point. Such a provision would probably not belong in a draft convention, for it could have only a very slight normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, a "code of recommended practices".[189] It would therefore not be out of place to draw its users' attention to the drawbacks attendant on these "forgotten reservations" and to the benefits of withdrawing them. To that end, the following draft guideline could be adopted:

> *2.5.3* *Periodic review of the usefulness of reservations*
>
> *States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer answer their purpose.*
>
> *In such a review, States and international organizations should devote particular attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give careful consideration to the usefulness of the reservations in relation to their internal legislation and to developments in that legislation since the reservations were formulated.*

104. Apart from the obvious practical benefit offered by such a provision in dealing with "forgotten reservations", it would also have the merit of responding to the urgent appeals issued by the bodies responsible for the implementation and monitoring of treaties, especially—but not solely—in the field of human rights.[190]

105. It goes without saying that it should be regarded as no more than a recommendation (which is why the conditional tense is used) and that, after such a review, States would remain absolutely free to withdraw their reservations or not.

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[186] Cf. article 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries.

[187] Cf. Permanent Court of International Justice, Judgement of 25 May 1926, *Certain German interests in Polish Upper Silesia*, Series A, No. 7, p. 19.

[188] In that context, see J. F. Flauss, op. cit. (footnote 106), pp. 862-863.

[189] For this phrase, see the sixth report, A/CN.4/518/Add.1, para. 51.

[190] See para. 81 and footnote 155 above.

106. A final problem, which is quite as thorny, arises when the lawfulness of a reservation has been contested by a body, whether judicial or not, which is responsible for monitoring the application of a treaty.

107. The present report is not the place to reconsider the vexed question of reservations to normative treaties and, more particularly, to human rights treaties.[191] It seems difficult, however, to pass over completely in silence the question of whether a reservation declared impermissible is automatically "withdrawn from duty" as a result or whether it should or could be withdrawn by the reserving State.

108. The facts of the question were set out fairly clearly in the second report on reservations to treaties.[192] It will suffice to recall the basic features of the question:

(a) The human rights bodies recognize their right (and even their duty) to pronounce on the permissibility of reservations made with regard to treaties the implementation of which they are mandated to monitor; and

(b) Generally, they consider themselves entitled to act on their findings and to disregard any reservation that they have deemed inadmissible.

109. In the "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties", adopted in 1997,[193] the Commission expressed its agreement with the first of those positions[194] but considered that,

> "in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty". [195]

110. While hoping that his proposal will not lead the Commission to repeat the whole discussion that led it to adopt this position, the Special Rapporteur believes that it would be illogical not to reflect it in a draft guideline on the withdrawal of reservations. In his view, it follows necessarily that:

- The finding that a reservation is inadmissible should not be deemed either an abrogation or, still less, a withdrawal of that reservation;
- The reserving State (or international organization) cannot, nonetheless, ignore the finding and has the duty to take action;
- It must eliminate the causes of the inadmissibility; and

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[191] See para. 21 above.

[192] A/CN.4/477/Add.1; see particularly paras. 164-252.

[193] See *Yearbook ... 1997*, vol. II, Part Two, p. 57; document A/52/10; see also paras. 19-20 above.

[194] Para. 5 of the preliminary conclusions (although the Commission confines itself to recognizing the competence of these bodies to "comment upon [the admissibility of reservations] and express recommendations").

[195] Para. 10 of the preliminary conclusions.

– One of the ways of doing so—the most radical but the most satisfactory—is obviously to withdraw the disputed reservation or reservations.[196]

111. That was the course followed by Switzerland following the judgement in the *Belilos* case, in which the European Court of Human Rights ruled that the disputed declaration (which could in practice be considered a reservation) should be "held to be invalid".[197] Not without some reluctance, Switzerland withdrew the reservation, at least partially.[198]

112. It is, all the same, open to question whether a draft guideline should be devoted exclusively to a situation in which a reservation is declared inadmissible by a body monitoring or overseeing the implementation of the treaty to which the reservation relates. Regularization is, after all, called for in all cases where a reservation is inadmissible, including cases in which the reserving State or international organization itself recognizes the inadmissibility, whether of its own accord or in response to objections by the other parties.

113. Upon reflection, however, it seems preferable that the Commission should confine itself to cases in which inadmissibility is found by the body established under a treaty or dispute settlement. While it would be premature to rule on the purely procedural consequences of an inadmissible reservation without considering the more general question of its effect (or absence of effect), it would seem legitimate to give a ruling, in the section of the Guide to Practice relating to the withdrawal of reservations, on what should happen with reservations considered inadmissible by a monitoring body, in order to establish both that the mere finding of inadmissibility by such a body cannot be deemed a withdrawal of the reservation and that the withdrawal of that reservation by the reserving State or international organization is one of the possible responses—and probably the most satisfactory—to dealing with the problem.

114. Draft guideline 2.5.4 could therefore read as follows:

2.5.4 *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*.

The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation.[199]

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[196] On the problems resulting from the amendment of reservations, see section A 1 (b) below.

[197] Decision of 21 May 1987, Series A, vol. 132, para. 60.

[198] See section A 1 (b) below. On this point, see Jean-François Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse", *Revue Universelle des Droits de l'Homme* (*RUDH*) 1993, p. 298.

[199] In the opinion of the Special Rapporteur, the detailed justification for this draft guideline is provided by the statement contained in his second report, A/CN.4/477/Add.1; see particularly paras. 194-210 and 216-252.

(b) Omissions from the Vienna Conventions—Procedure for withdrawal of reservations

(i) *Silence of the Vienna Conventions on the procedure for the withdrawal of reservations*

115. The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,[200] are entirely silent as to the procedure for their withdrawal. The question has not, however, been completely overlooked by several of the Commission's Special Rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of "formal notice"[201] but did not specify who should notify whom, or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

> "... Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty."[202]

The distinguished jurist did not accompany this part of his draft with any commentary.[203]

116. Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it[204] and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Waldock pointed out that "[n]otification of the withdrawal of a reservation would normally be made through a depositary".[205] This approach was approved by Israel, the only State to provide comments on the draft adopted at first reading on that topic,[206] and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal "becomes operative when *notice of it has been received by the other States concerned from the depositary*".[207]

117. During the discussion in the Commission, Waldock explained that the omission of a reference to the depositary at first reading had been due solely to "inadvertence"[208] and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it was "not as clear as it appeared"[209] and suggested the adoption of a single text grouping together all notifications made by the depositary.[210] Although the Drafting Committee did not immediately adopt this idea, it probably explains why its draft again omitted any reference to the

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[200] See para. 120 below.
[201] See para. 68 above.
[202] *Yearbook ... 1962*, vol. II, p. 61; see para. 69 above.
[203] See ibid., p. 66.
[204] See para. 70 above.
[205] *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 71.
[206] *Yearbook ... 1965*, vol. II, p. 55; see also footnote 122 above.
[207] Ibid., p. 56; italics added. See para. 72 above.
[208] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.
[209] Ibid., p. 176, para. 65.
[210] See ibid., 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, p. 73.

depositary,[211] who is also not mentioned in the Commission's final draft[212] or in the text of the Convention itself.[213]

118. The silence of the Vienna Conventions regarding the procedure for the withdrawal of reservations should be rectified by the Guide to Practice. To do this, the Commission might contemplate transposing the rules relating to the formulation of reservations. That calls for further consideration, however.

119. On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary, in 1966, on draft article 51 on the law of treaties, relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".[214] As Paul Reuter pointed out, however, the Commission "is really taking exception only to the formalist conception of international agreements: it feels that what one consensual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of the *acte contraire*". ([La Commission] s'insurge en réalité seulement contre une conception formaliste des accords internationaux: pour elle, ce qu'un acte consensuel a établi, un autre acte consensuel, même s'il est d'une forme différente du premier, peut le défaire: elle admet en réalité une conception non formaliste de la théorie de *l'acte contraire*)".[215] This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

120. On the other hand, it has to be said that the Vienna Conventions contain few rules specifically relating to the procedure for making reservations, apart from article 23, paragraph 1, which merely states that they must be "communicated to the

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[211] See ibid., 814th meeting, 29 June 1965, p. 272, para. 22, and the comments by Mr. Rosenne and Sir Humphrey, ibid., paras. 26-28.

[212] Article 20, para. 2; see the text of this provision, para. 74 above.

[213] See above the text of the provisions relating to the withdrawal of reservations in the 1986 Vienna Convention, articles 22 and 23.

[214] Para. (3) of the commentary on draft article 51, *Yearbook ... 1966*, vol. II, p. 249; see also the commentary on article 35, ibid., pp. 232-233.

[215] *Introduction au droit des traités*, Presses Universitaires de France, Paris, third ed., ed. Philippe Cahier, p. 141, para. 211 (original italics); see also Sir Ian Sinclair, *The Vienna Conference on the Law of Treaties*, Manchester University Press, second ed., 1984, p. 183. For a flexible position on the denunciation of a treaty, see International Court of Justice (ICJ), decision of 21 June 2000, *Aerial incident of 10 August 1999 (Competence of the Court), ICJ Reports 2000*, p. 25, para. 28.

contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty".[216]

121. Since there is no treaty provision directly concerning the procedure for withdrawing reservations, and in view of the inadequacy even of those relating to the formulation of reservations, the Commission should thus consider the draft guidelines on these topics contained in the sixth report, examine them in the light of the current practice and the (rare) discussions of theory and consider the possibility and the appropriateness of transposing them, with modifications, to the withdrawal of reservations. This is the approach which will be followed below with regard to

- Competence to withdraw a reservation;
- Communication of the withdrawal.[217]

(ii) *Competence to withdraw a reservation*

122. The Special Rapporteur has proposed two alternative draft guidelines 2.1.3 entitled "Competence to formulate a reservation at the international level". These draft guidelines, which are based on article 7 of the Vienna Conventions, "Full powers", have been sent to the Drafting Committee, which, however, has not yet considered them.[218] They read as follows:[219]

> ***[2.1.3*** *Competence to formulate a reservation at the international level*
>
> *Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]*
>
> ***[2.1.3*** *Competence to formulate a reservation at the international level*
>
> *1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:*
>
> *(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the*

[216] The Special Rapporteur has proposed that this text should be reproduced in draft guideline 2.1.5, paragraph 1, while a second paragraph would detail the procedure to be followed when the reservation relates to the constituent instrument of an international organization; see the sixth report, A/CN.4/518/Add.1, paras. 113 and 133.

[217] These problems, relating to the formulation of reservations, correspond to those dealt with in draft guidelines 2.1.3, 2.1.3 bis and 2.1.4, on the one hand, and 2.1.5 to 2.1.7, on the other, as proposed by the Special Rapporteur in his sixth report. There would appear no need to consider the possibility of using draft guideline 2.1.7 bis ("Case of manifestly impermissible reservations": see para. 46 above). As for the question of the effective date of communications relating to reservations (cf. draft guideline 2.1.8, "Effective date of communications relating to reservations"), this will be considered below, section A 1 (b) (ii), in the general context of the effect of a withdrawal.

[218] See para. 38 above.

[219] For the presentation of the two alternative versions of the draft guideline, see the sixth report, A/CN.4/518/Add.1, paras. 53-71.

reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization]].

123. Whichever version is adopted,[220] there seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations[221] apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with the competence to bind the State or international organization at the international level. This must, therefore, apply *a fortiori* to its withdrawal, which puts the seal on the reserving State's commitment.

124. The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had enquired about the "form in which the notifications of withdrawal" of some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953 and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 should be made.[222] After noting that the Vienna Convention makes no reference to the subject and recalling the definition of "full powers" given in article 2, paragraph 1 (c),[223] the author of the letter adds:

> "Clearly the withdrawal of a reservation constitutes an important transaction and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the

[220] On their respective advantages and disadvantages, see ibid., para. 68.

[221] Ibid., para. 56.

[222] *United Nations Juridical Yearbook 1974*, pp. 190-191.

[223] "[The Vienna Convention] defines 'full powers' as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty'".

formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations."

And in conclusion:

"Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make up for the resulting inconvenience"[224] (original italics).

125. Firm though this conclusion is, the words "in principle", which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges, "on several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative, duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so".[225]

126. This raises a question that the Special Rapporteur has already mentioned in relation to the formulation of reservations:[226] would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

127. After thorough consideration, however, the Special Rapporteur, although considering this progressive development "limited but welcome",[227] has not proposed to adopt it, since he is anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions. He will also forbear from including a provision on withdrawal. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,[228] so long as

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[224] A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: "A reservation must be formulated in writing (article 23, paragraph 1 of the [Vienna] Convention), and both reservations *and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention)" (*United Nations Juridical Yearbook 1976*, p. 211—italics added).

[225] *United Nations Juridical Yearbook 1974*, pp. 190-191. This is confirmed by the memorandum of 1 July 1976: "On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations" (*United Nations Juridical Yearbook 1976*, p. 211, note 121).

[226] Sixth report, A/CN.4/518/Add.1, paras. 63-64.

[227] Ibid., para. 66.

[228] See para. 119 above.

it is understood that a "non- formalist conception"[229] of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Vienna Conventions.

128. Moreover, it seems that the United Nations Secretary-General has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the Organization.[230] And, in the latest edition of the *Summary of practice of the Secretary-General as depositary of multilateral treaties*, the Treaty Section of the Office of Legal Affairs states: "Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty".[231] There is no mention of any possible exceptions.

129. The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation[232] and withdrawal[233] of reservations by letters from the permanent representatives to the Council.

130. It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called in question by the inclusion of over-rigid rules in the Guide to Practice. That would not be the case, however, if guideline 2.1.3 were transposed to the withdrawal of reservations, since both the two proposed versions[234] take care to maintain the "customary practices in international organizations which are depositaries of treaties".

131. The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, the problem is the same as that regarding the formulation of reservations. It is addressed by draft guidelines 2.1.3 bis and 2.1.4 proposed by the Special Rapporteur.

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[229] See Paul Reuter's phrase, ibid.

[230] J. F. Flauss (op. cit. (footnote 160), p. 860), however, mentions a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, of 1 March 1980), was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations.

[231] Op. cit. (footnote 160), p. 64, para. 216.

[232] See the sixth report, A/CN.4/518/Add.1, para. 64.

[233] Cf. European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and reservations to those Conventions*, Note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (99) 36, Strasbourg, 30 March 1999.

[234] See para. 122 above.

2.1.3 bis *Competence to formulate a reservation at the internal level*[235]

The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.

2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*[236]

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

132. The replies by States and international organizations to the questionnaire on reservations do not give any utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.

133. Thus, in Italy, problems arose in connection with the withdrawal, in 1989, of the "geographic limitation" formulated by it in 1954 to the Convention relating to the Status of Refugees of 28 July 1951.[237] Although this reservation, which limited the application of the Convention to persons who had become refugees following the "events that had taken place ... in Europe", had been formulated by the Executive, without any request from Parliament, its withdrawal was decided by a decree-law of 1989 and converted into law in 1990. Theoretically, this was unnecessary:[238] Whereas reservations introduced at the request of the legislature require it to be consulted, those decided by the Executive alone do not, in accordance with the principle of parallelism of forms.

134. In France, "like the denunciation of treaties, which is the exclusive prerogative of the Government [239], the withdrawal of reservations lies within the competence of the Executive. No distinction is made between cases in which the treaty is submitted for parliamentary authorization through ratification or approval and those in which it is not" (à l'instar de la dénonciation des traités qui est une prérogative exclusive du Gouvernement, le retrait des réserves constitue une compétence de l'exécutif. Aucune distinction ne s'impose en l'occurrence, selon que la convention est soumise à autorisation parlementaire de ratification ou d'approbation ou selon qu'elle ne l'est pas).[240]

135. A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.[241] There seems no reason, therefore, why the wording

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[235] For the presentation of the draft guideline, see the sixth report, A/CN.4/518/Add.1, paras. 72-77.
[236] For the presentation of the draft guideline, see ibid., paras. 78-82.
[237] For a detailed exposition, see G. Gaja, "Modalità singolari per la revoca di una riserva", *Rivista di diritto internazionale 1989*, pp. 905-907.
[238] See ibid. and L. Migliorino, op. cit. (footnote 107), pp. 332-333.
[239] See the sixth report on reservations, A/CN.4/518/Add.1, para. 75.
[240] J. F. Flauss, op. cit. (footnote 160), p. 863; footnotes not reproduced.
[241] Sixth report, A/CN.4/518/Add.1, para. 73.

of draft guideline 2.1.3 bis should not be transposed to the withdrawal of reservations, if, that is, the former is retained by the Drafting Committee.[242]

136. The same applies to draft guideline 2.1.4,[243] which should, however, be retained in any case, whatever happens to guideline 2.1.3 bis, since it would seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its domestic law; this situation could very well arise in practice, although the Special Rapporteur does not know of any specific example.

137. There might be a case for applying to reservations the "defective ratification" rule of article 46 of the Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. As the Special Rapporteur indicated in his sixth report,[244] however, he does not think that the principle stated in article 46 can be transposed to the question of formulating reservations, since the relevant rules are seldom spelt out in formal texts of a constitutional or even a legislative nature. This applies still more to the withdrawal of reservations, as is abundantly shown by the confusion felt by legal theorists concerning the procedure to be followed in situations where the problem might arise:[245] if specialists in such matters are in disagreement amongst themselves or criticize the practices of their own governments, other States or international organizations cannot be asked to delve into the mysteries and subtleties of internal law.

138. Since it appears that a modified version of draft guidelines 2.1.3, 2.1.3 bis and 2.1.4 could be applied to the withdrawal of reservations, the question arises as to the form in which that version should appear in chapter 2, section 5, of the Guide to Practice, which deals with the withdrawal and modification of reservations and interpretative declarations. In the view of the Special Rapporteur, two courses of action may be considered:

- Either the text could be reproduced in its entirety, only with the word "formulate" replacing the word "withdraw" (and with a few other adjustments);
- Or the guideline could be more of a synthesis, establishing the principle of parallelism of forms.

139. If the Commission opts for the first of these courses of action, the corresponding guidelines could read as follows:

[2.5.5 Competence to withdraw a reservation at the international level[246]

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State of an international

[242] On the Special Rapporteur's uncertainty in that regard, see ibid., para. 77.
[243] Para. 131 above.
[244] A/CN.4/518/Add.1, paras. 80-81.
[245] On Italy, in particular, see the articles cited in footnotes 237 and 238 and the examples of legal theory given therein.
[246] This guideline is closely modelled on the short version of draft guideline 2.1.3.

organization to be bound by a treaty is competent to withdraw a reservation on behalf of such State or international organization.]

[2.2.5 Competence to withdraw a reservation at the international level[247]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of that withdrawal; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

[(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization].]

***2.5.5 bis** Competence to withdraw a reservation at the internal level*

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or international organization.

***2.5.5 ter** Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

140. Even apart from the replacement of the word "formulate" by the word "withdraw", the transposition is not entirely word for word, at least as far as the "long version" of draft guideline 2.1.3 (for which the Special Rapporteur, and, it seems, the majority of the Commission, have a preference) is concerned:

- Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound, and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));

[247] This guideline is closely modelled on the long version of draft guideline 2.1.3.

– For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

141. Another way of proceeding would be to model the draft guidelines closely on those relating to the competence to formulate reservations. It could not be a straight transposition, however; for the reasons given above, some adaptation is needed. Draft guideline 2.5.5 could thus be worded as follows:

[2.5.5 Competence to withdraw a reservation

The determination of the competent body and the procedure to be followed for withdrawing a reservation are governed, mutatis mutandis, by the rules applying to the formulation of reservations given in guidelines 2.1.3, 2.1.3 bis and 2.1.4.]

142. This second formulation certainly has the merit of conciseness. The Special Rapporteur is not, however, convinced that it is preferable to the first: the Guide to Practice is not a treaty; it is a "code of recommended practices" on reservations and it would seem preferable that the user should find them there directly, without having to refer to other provisions or to commentaries. Above all, the expression "mutatis mutandis", the inclusion of which is essential, since a straight transposition is impossible, at least if the long version of draft guideline 2.1.3 is used,[248] would inevitably give rise to confusion. Despite the risk of seeming repetitive and slightly ponderous, the long versions of draft guidelines 2.5.5, 2.5.5 bis and 2.5.5 ter (which would, in that case, need to be renumbered) would thus seem more appropriate.

(iii) *Communication of withdrawal of reservations*

143. As shown above,[249] the Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal but it does not specify either who should make this notification or the procedure to be followed. Here too, therefore, it might be best to follow the method adopted in respect of competence to withdraw and to consider whether it might not be possible and appropriate to use a modified form of the draft guidelines proposed by the Special Rapporteur in relation to the communication of reservations themselves.

144. The relevant draft guidelines are numbered 2.1.5 to 2.1.7 and read as follows:

2.1.5 Communication of reservations[250]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the

[248] See para. 140 above.

[249] Paras. 115-121.

[250] For the presentation of this draft guideline, see the sixth report, A/CN.4/518/Add.1, paras. 99-129.

capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 Procedure for communication of reservations[251]

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 Functions of depositaries[252]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

145. The first remark that must be made is that, although the Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that

- Notification of withdrawal must be made by the depositary, if there is one; and
- The recipients of the notification must be "every State which is or is entitled to become a party to the treaty" and "interested States".[253]

146. It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76 to 78 of the 1969 Vienna Convention,[254] that these

[251] For the presentation of this draft guideline, see the sixth report, A/CN.4/518/Add.2, paras. 135-154.

[252] For the presentation of this draft guideline, see ibid., paras. 156-170.

[253] See paras. 115 and 116 above.

[254] And articles 77 to 79 of the 1986 Convention.

proposals were abandoned.[255] They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6, given above.[256]

147. This approach is endorsed by the legal theory on the topic,[257] meagre though it is, and is also in line with current practice. Thus,

- Both the Secretary-General of the United Nations[258] and the Secretary General of the Council of Europe[259] observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

- Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation for reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal[260] and even that he should communicate it to the Contracting Parties[261] or, more broadly, to "every State" entitled to become party or to "every State", without specifying further.[262]

148. As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations in draft

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[255] See para. 117 above; see also the sixth report, A/CN.4/518/Add.2., para. 136.

[256] Para. 144.

[257] Cf. L. Migliorino, op. cit. (footnote 107), p. 323, or Adolfo Maresca, *Il diritto dei trattati*, Giuffrè, Milan, 1971, p. 302.

[258] See *Multilateral Treaties* ..., op. cit. (footnote 174), vols. I and II, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations of 18 April 1961 by China, Egypt and Mongolia, vol. I, p. 108, notes 13, 15 and 17, or to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 by Colombia, Jamaica and the Philippines, ibid., pp. 403-404, notes 8, 9 and 11).

[259] See *CDCJ Conventions* ..., op. cit. (footnote 233): withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 1963, pp. 11 and 12.

[260] See, for example, the Convention on the Contract for the International Carriage of Goods by Road, of 19 May 1956, article 48, para. 2; the Convention on the Limitation Period in the International Sale of Goods, as amended, of 1 August 1988, article 40, para. 2; the Convention on the fight against corruption involving officials of the European communities or officials of Member States of the European Union, article 15, para. 2; or the Council of Europe Convention on Cybercrime, article 43, para. 1.

[261] See, for example, the European Agreement on Road Markings of 13 December 1957, articles 15, para. 2, and 17 (b), or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of 26 October 1961, articles 18 and 34 (c).

[262] See, for example, the Convention on Psychotropic Substances of 21 February 1971, articles 25, para. 5, and 33, the Customs Convention on Containers of 2 December 1972, articles 26, para. 3, and 27, the International Convention on the Harmonization of Frontier Control of Goods of 21 October 1982, articles 21 and 25, or the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (notification to be made "to Member States of the Hague Conference on Private International Law").

guidelines 2.1.6 and 2.1.7,[263] which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention[264] and are in conformity with the principles on which the relevant Vienna rules are based:[265]

- Under article 78, paragraph 1 (e), the depositary is given the function of "informing the Parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6 (ii);

- The first paragraph of draft guideline 2.1.7 is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether "notification or communication relating to the treaty is in due and proper form and, if need be, [bring] the matter to the attention of the State or international organization in question"; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication); [266]

- The second paragraph of the same draft guideline carries through the logic of the "letter-box depositary" theory endorsed by the Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

149. The same problem therefore arises as arose in connection with competence to withdraw a reservation:[267] since the rules contained in draft guidelines 2.1.5 to 2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to competence to withdraw a reservation, the Special Rapporteur indicated his preference for the fuller version, an adaptation of draft guidelines 2.1.3, 2.1.3. bis and 2.1.4.[268] That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible. The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 and 2.1.7 fits perfectly, with the simple replacement of the word "formulation" by the word "withdrawal".

150. A reference to earlier guidelines thus seems less open to objection. In that spirit, the following draft guideline could, perhaps, be adopted:

[263] See text para. 144 above.
[264] These correspond to articles 77 and 78 of the 1969 Convention.
[265] See the sixth report, A/CN.4/518/Add.2, paras. 135-154 and 156-170.
[266] See paras. 124-125 above.
[267] See para. 138 above.
[268] See para. 142 above.

[2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.]

151. If, however, the Commission considers that it would be preferable to avoid referring to these draft guidelines, it is possible to opt for transposition, as follows:

[2.5.6 Communication of withdrawal of reservations

The withdrawal of a reservation must be communicated [in writing[269]] to the contracting States and contracting organizations and other States and other international organizations entitled to become parties to the treaty.

The withdrawal of a reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.5.6 bis Procedure for communication of withdrawal of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to the withdrawal of a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the withdrawal to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to the withdrawal of a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.5.6 ter Functions of depositaries

The depositary shall examine whether the withdrawal by a State or an international organization of a reservation to a treaty is in due and proper form.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.]

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[269] If this approach is adopted, the words "in writing" should probably be omitted from the text of draft guideline 2.5.6, since this requirement is the subject of draft guideline 2.5.2 (para. 90 above), which reproduces the text of article 23, para. 4, of the Vienna Conventions and which it would therefore not be appropriate to combine with draft guideline 2.5.6.

2. Effect of the withdrawal of a reservation

152. In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

- In the first place, article 22 of the Vienna Conventions links the rules governing the form and procedure[270] of a withdrawal closely with the question of its effect; and
- In the second place, the effect of a withdrawal may be viewed simply as a matter of form, thus precluding the need to go into the infinitely more complex effect of the reservation itself; this is, in any case, the only reasonable way of apprehending the effect at this stage.

153. Article 22, paragraph 3 (a), of the Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal "becomes operative". During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(a) Time at which the withdrawal of a reservation becomes operative

154. Under article 22, paragraph 3, of the 1986 Convention,

> "Unless the treaty otherwise provides, or it is otherwise agreed:
>
> "(a) The withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization".

155. This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Convention[271] or at the Vienna Conference of 1968-1969, which did no more than clarify[272] the text adopted at second reading by

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[270] Admittedly, only to the extent that para. 3 (a) refers to the "notice" of a withdrawal.

[271] See Paul Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 38, and fifth report, *Yearbook ... 1976*, vol. II (Part One), p. 146; for the (lack of) discussion by the Commission: *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 100, paras. 30-35 and 1435th meeting, 7 June 1977, p. 103, paras. 1 and 2; also 1451st meeting, 1 July 1977, p. 194, paras. 12-16, and the Commission's report of the same year, ibid., vol. II (Part Two), pp. 114-116; and, for the second reading, see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the 1652nd meeting, 15 May 1981, and 1692nd meeting, 16 July 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-28 and p. 265, para. 38, and the final text, ibid., vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36-37.

[272] Cf. *Official Records* ..., op. cit. (footnote 132), p. 142, para. 211 (text of the Drafting Committee).

the Commission.[273] Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

156. Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,[274] Sir Humphrey Waldock expressed no such intention in his first report, in 1962.[275] It was, however, during the Commission's discussions in that year that, for the first time, a provision was included, at the request of Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".[276]

157. Following the adoption of this provision on first reading, three States reacted:[277] the United States of America, which welcomed it; and Israel and the United Kingdom of Great Britain and Northern Ireland, which was concerned about the difficulties that might be encountered by other States Parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a paragraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.[278] In this way, Sir Humphrey intended to give the other parties the opportunity to take the "requisite legislative or administrative action ..., where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.[279]

158. As well as criticizing the overcomplicated formulation of the admittedly rather strange solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Ruda, supported by Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry into force of a treaty as a result of the consent given by a State to be bound.[280] Other members, however, including Tunkin and Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal

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[273] The plural ("... when notice of it has been received by the other contracting States": see *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (cf. the exposition by Yasseen, Chairman of the Conference Drafting Committee, in *Official Records* ..., op. cit. (footnote 133), 11th plenary meeting, p. 39, para. 11); see para. 172 below. On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, p. 285, and *Yearbook ... 1966*, vol. I, p. 327.

[274] See para. 68 above and para. 177 below.

[275] See para. 69 above.

[276] See para. 70 above.

[277] See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 55-56, document A/CN.4/177 and Add.1 and 2

[278] "(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

[279] *Yearbook ... 1965*, v. I, 800th meeting, 11 June 1965, p. 175, para. 47.

[280] Ibid., p. 176, para. 59 (Ruda) and p. 177, para. 76 (Briggs).

law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other State concerned, but on the will of the reserving State which decided" to withdraw it.[281]

159. When the text returned from the Drafting Committee, however, the period of grace had gone,[282] since the Commission "considered that such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".[283] The Commission thus reverted to the principle that a withdrawal became operative once the other Contracting Parties had been notified, although not, it seems, without some hesitation: in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation [resulting from the withdrawal of the reservation] would be going too far", the Commission

> "felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned".[284]

160. This raises another problem: the Commission had surreptitiously reintroduced, in the Commentary, the exception that Waldock had, if clumsily, tried to incorporate in the text itself of what became article 22 of the Convention. And this was undoubtedly not a good course of action. True, the Commission linked the exception with the general principle of good faith, but, although it can constitute the basis for some rules,

> "[t]he principle of good faith is, as the [International] Court [of Justice] has observed, 'one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests, ICJ Reports 1974*, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist'" (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgment, ICJ Reports 1988*, p. 105, para. 94).

161. The question thus arises as to whether the Guide to Practice should include the clarification contained in the Commission's commentary of 1965: it makes sense to be more specific in this code of recommended practices than in the general conventions on the law of treaties. In this case, however, it would seem most inadvisable: the "rule" set out in the commentary manifestly contradicts that appearing in the Convention and its inclusion in the Guide would therefore depart from that rule. This would be acceptable only if it was felt to meet a clear need, which probably does not exist in this case. Sir Humphrey Waldock had, in 1965, "heard of no actual difficulty arising in the application of a treaty from a State's

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[281] Ibid., p. 176, paras. 68 and 69 (Tunkin); see also p. 175, para. 54 (Tsuroka) and p. 177, paras. 78-80 (Waldock).

[282] Ibid., 814th meeting, 29 June 1965, p. 273, para. 22

[283] Explanation given by Waldock, ibid., para. 24.

[284] *Yearbook ... 1966*, v. II, p. 209, para. (2) of the commentary to the draft article 20.

withdrawal of its reservation;"[285] this would still seem to be the case 37 years later. The Special Rapporteur is therefore not in favour of this solution, nor of including in the commentary the Commission's questionable attempt, in its 1965 commentary, to soften the force of the provision.

162. It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be regulated by a specific provision in the treaty". In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

163. This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than that given, in accordance with general law, in article 22, paragraph 3 (a), of the Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.[286] Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, of 5 May 1989, article 32, para. 3,

> "Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect *on the date of receipt of such notification by the Secretary General*" (italics added)

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.[287] And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.[288]

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[285] See footnote 283.

[286] See the examples given by P. H. Imbert, op. cit. (footnote 106), p. 290, note 36, or by F. Horn, op. cit. (footnote 106), p. 438, note 19. See also, for example, the United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980, article 94, para. 4 (six months), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of 23 June 1979, article XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary), or the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted 1 August 1989 by the Hague Conference on Private International Law, article 24, para. 3 (three months after notification of the withdrawal).

[287] Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: cf. the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, article 8, para. 2; the 1977 European Agreement on the Transmission of Applications for Legal Aid, article 13, para. 2; or the 1997 European Convention on Nationality, article 29, para. 3.

[288] Cf. the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention (Revised)) of 18 May 1973, article 12, para. 2: "... Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect."

164. In view of the foregoing, the right course of action would seem to be, first, to reproduce in the Guide to Practice the text of article 22, paragraph 3 (a), of the Vienna Conventions, without the toning down suggested by the Commission's commentary in 1965, and, secondly, to accompany the text of the relevant guideline (2.5.9[289]) with a model clause A that would reflect the concerns expressed when the provision was drafted, and repeated by the Commission in 1965:

> **Model clause A**—*Deferment of the effective date of the withdrawal of a reservation*
>
> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [depositary].*

165. Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.9, is deficient in several respects.[290] In the second place, in cases such as this, the parties are in possession of all the information indicating the probable time scale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

166. Conversely, situations may arise in which States agree that they prefer a shorter time scale. There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the Vienna Conventions, whether by shortening the period required for the withdrawal to take effect or by giving the reserving State the power to determine the date on which the withdrawal should take effect. Model clauses B and C correspond to each of these situations:

> **Model clause B**—*Earlier effective date of withdrawal of a reservation*
>
> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date of receipt of such notification by [depositary].*[291]
>
> **Model clause C**—*Freedom to set the effective date of withdrawal of a reservation*
>
> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [depositary].*[292]

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[289] See para. 175 below.

[290] See para. 172 below.

[291] This wording is closely based on that of the 1989 European Convention on Transfrontier Television, article 32, para. 3, given in para. 163 above.

[292] Cf. the 1973 Kyoto Convention (Revised) (footnote 288 above), article 12, para. 2.

167. The question arises whether, in the absence of such a clause, a State is free to set the effective date of the withdrawal of a reservation that it has made. The answer must undoubtedly be in the affirmative, if that date is later than that resulting from the application of article 22, paragraph 3 (a): the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes.

168. That is not the case, however, if the date is prior to the receipt of notification by the other Contracting Parties: in that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.[293] In such situations, in the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), if the other Contracting Parties object. It is, however, worth considering whether the category of treaties establishing "integral obligations" should not be retained, especially in the field of human rights; in such a situation, there can be no objection—quite the contrary—to the fact that the withdrawal of the reservation takes immediate, even retroactive, effect, if the State making the original reservation so wishes, since the legislation of other States is, by definition, not affected.[294]

169. It would probably be useful if the Guide to Practice were to specify the cases in which article 22, paragraph 3 (a), of the Vienna Conventions does not apply, not because of a derogation[295] but because it was never intended to apply. This could be the subject of a draft guideline 2.5.10:

> ***2.5.10*** *Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation*
>
> *The withdrawal of a reservation takes effect on the date set by the withdrawing State where:*
>
> *(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or*
>
> *(b) The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations.*

170. Paragraph (a) of this draft guideline deliberately uses the plural ("the other contracting States or international organizations") where article 22, paragraph 3 (a), uses the singular ("that State or that organization"). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit

[293] See the example given by P. H. Imbert, op. cit. (footnote 106), p. 291, note 38 (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954: see *Multilateral Treaties* ..., op. cit. (footnote 174), pp. 314 and 319-20). See also the example given in footnote 158 above.

[294] In this connection, see P. H. Imbert, op. cit. (footnote 106), pp. 290-291.

[295] As would be the case in the situation discussed in paras. 159-161 above.

nor the raison d'être of article 22, paragraph 3 (a), would have been respected. As for paragraph (b), it addresses situations in which reservations have, in effect, been retroactively withdrawn.[296]

171. The principle remains that contained in article 22, paragraph 3 (a), which should definitely be reproduced in the Guide to Practice.

172. This principle is, of course, not above criticism. Apart from the problems—considered above[297]—arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph does not "really resolve the question of the time factor" (ne résout pas vraiment la question du facteur temps):[298] although, thanks to the specific provision introduced at the Vienna Conference in 1969,[299] the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become operational.[300] Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice[301] to justify "revising" the Vienna text.

173. It should be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b) [302] of the 1969 Convention provide. And that is how the International Court of Justice ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties:[303]

> "by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned".[304]

174. The exception established by the provisions of article 22, paragraph 3 (a), of the Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with

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[296] See note 293 above.

[297] Paras. 157-162.

[298] P. H. Imbert, op. cit. (footnote 106), p. 290.

[299] See footnote 273 above.

[300] In this connection, see the comments by Briggs, *Yearbook 1965*, vol. I, 800th meeting, 14 June 1965, p. 177, para. 75 and 814th meeting, 29 June 1965, p. 273, para. 25.

[301] See para. 161 above.

[302] Article 79 (b) of the 1986 Convention.

[303] See ICJ, Judgment of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, *ICJ Reports 1998*, p. 293, para. 30.

[304] Judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *ICJ Reports 1957*, p. 146; see also *ICJ Reports 1998*, p. 291, para. 25.

regard to that State, even though they were unaware of the withdrawal.[305] This concern must be commended.

175. It would therefore be appropriate to reproduce, in the Guide to Practice, the provisions of article 22, paragraph 3 (a) (in the 1986 version, which includes international organizations).

2.5.9 Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

176. It may be noted in passing that the wording of this provision is open to the same objection as that of draft guideline 2.5.1,[306] in that it states that it applies only if the treaty does not otherwise provide; this is true of all the provisions of the Vienna Conventions and, therefore, of the guidelines in the Guide to Practice. Nevertheless, for the same reasons given with regard to draft guideline 2.5.1,[307] it seems preferable to make do with this questionable form of words.

(b) Consequences of withdrawal of a reservation

177. During the *travaux préparatoires* of the 1969 Convention, consideration was given to devoting a provision to the effect of the withdrawal of a reservation:

- In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn,

  "... the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties";[308]

- Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that "upon withdrawal of a reservation the provisions of article 21 [relating to the application of reservations] cease to apply";[309] this sentence disappeared from the Commission's final draft,[310] although,

- In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely "the possibility that the effect of the withdrawal of a reservation might be that the treaty

[305] See the Commission's commentary on draft article 22, adopted on first reading, *Yearbook ... 1962*, vol. II, pp. 181-182 and to draft article 20, adopted on second reading, *Yearbook ... 1966*, vol. II, pp. 209.

[306] See para. 85 above.

[307] See para. 86 above.

[308] *Yearbook ... 1956*, vol. II, p. 116; document A/CN.4/101, art. 40, para. 3.

[309] *Yearbook ... 1962*, vol. II, p. 181; see para. 70 above.

[310] It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (cf. footnote 278 above), without offering any comment (cf. *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22).

entered into force in the relations between two States between which it had not previously been in force";[311] and,

- During the Vienna Conference, several amendments aimed to re-establish a provision to that effect in the text of the Convention.[312]

178. The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.[313] This is only partially true.

179. There can be no doubt that "the effect of withdrawal of a reservation is obviously to restore the original text of the treaty".[314] A distinction should, however, be made between three possible situations.

180. In the relations between the reserving and the accepting State (or international organization) (article 20, para. 4 of the Vienna Conventions), the reservation ceases to be operational (article 21, para. 1): "In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made."[315] Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, which provides for the competence of the International Court of Justice;[316] there had been no objection to this reservation and, as a result of the withdrawal, the Court's competence to interpret and apply the Convention was established from the effective date of the withdrawal.[317]

181. The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 31, paragraph 3, of the Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: "In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation".[318]

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[311] Ibid., 800th meeting, 14 June 1965, p. 178, para. 86; in that context, see Rosenne, ibid., para. 87.

[312] Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1; see *Official Records* ..., op. cit. (footnote 132), with a subamendment by the USSR (A/CONF.39/C.1/L.167, ibid.).

[313] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 70th meeting (14 May 1968), statement by K. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

[314] Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Year Book of International Law, 1976-1977*, p. 87. See also R. Szafarz, op. cit. (footnote 159), p. 313.

[315] L. Migliorino, op. cit. (footnote 107), p. 325; in that connection, see R. Szafarz, ibid., p. 314.

[316] See *Multilateral Treaties* ..., op. cit. (footnote 174), p. 376, note 15.

[317] L. Migliorino, op. cit. (note 107), pp. 325-326.

[318] L. Migliorino, ibid., pp. 326-327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations of 1961, article 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the

182. The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force[319] on the date on which the withdrawal takes effect. "For a State ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving State".[320]

183. In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

184. For the sake of clarity, it would probably be appropriate to reflect these distinct effects in two separate draft guidelines:

2.5.7 *Effect of withdrawal of a reservation*

The withdrawal of a reservation entails the application of the treaty as a whole in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation.

2.5.8 *Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization*

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization.

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entry into force of the Convention between themselves and Portugal (see *Multilateral Treaties* ..., op. cit. (footnote 174), p. 108, note 18).

[319] See article 24 of the Vienna Conventions, especially paragraph 3.

[320] R. Szafarz, op. cit. (footnote 159), pp. 315-316; in that connection, see J. M. Ruda, op. cit. (footnote 138), p. 202, D. Bowett, op. cit. (footnote 314), p. 87, and L. Migliorino, op. cit. (footnote 107), pp. 328-329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to the 1969 Vienna Convention, article 66 (see *Multilateral Treaties* ..., op. cit. (footnote 174), vol. II, p. 279, note 6); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

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Seventh report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

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***Note*: This report was drafted entirely in French, although some quotations (translated into French by the Special Rapporteur, for which he is solely responsible) are reproduced in their original language.**

B. Modification of reservations

185. The question of the modification of reservations should be posed in connection with the questions of withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the "initial reservation",[321] which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above (sect. II.B.1). If, on the other hand, the effect of the modification is to strengthen an existing reservation, it would seem logical to start from the notion that what we are dealing with is the late formulation of a reservation, and to apply to it the rules applicable in this regard (see sect. II.B.2).

186. While these two postulates appear to be virtually self-evident, it is appropriate to briefly ascertain their relevance in the light of practice.

1. Reduction of the scope of reservations

(Partial withdrawal)

187. In accordance with the prevailing doctrine, "[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect".[322] While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal.

188. Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect.[323] Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides that:

> "The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations".

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[321] While the expression "initial reservation" is used for convenience, it is improper: it would be more accurate to speak of a reservation "as it was initially formulated"; as its name indicates, a "partial withdrawal" does not substitute one reservation for another, but rather one formulation for another.

[322] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge U.P., 2000, p. 128. See also Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 293, or Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, Strasbourg, 1999, p. 96.

[323] This is also the case, of course, where the treaty authorizes the formulation of new reservations after its entry into force; see sect. II.B.2 below.

189. In addition, we more frequently find reservation clauses expressly contemplating the total *or partial* withdrawal of reservations. For example, article 8, paragraph 3, of the Convention on the Nationality of Married Women, of 20 February 1957, provides that:

> "Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received".[324]

The same applies to article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law, of 4 November 1998, which reads as follows:

> "Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General".[325]

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of article K.2 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

> "Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification".

190. The fact that they are mentioned simultaneously in numerous treaty clauses highlights the close relationship between total and partial withdrawal of reservations. This similarity, confirmed in practice, is, however, sometimes contested in the literature.

191. During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.[326] Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation "in part",[327] although no reason for this modification can be inferred from the summaries of the discussions.

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[324] See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs of 1961, as amended in 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations".

[325] See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism of 27 January 1977: "Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt". For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see para. 97 above.

[326] Cf. draft article 17, para. 6, in Sir Humphrey's first report, *Yearbook ... 1962*, vol. II, p. 69, para. 69.

[327] Ibid., p. 201; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see para. 70 above.

192. The most plausible explanation is that this seemed to be self-evident — "he *who can do more can do less*" — and the word "withdrawal" should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning "total or partial withdrawal".

193. The fact remains that this is not entirely self-evident and that the literature appears to be somewhat undecided. Thus, in his masterwork on reservations, published in 1979, Professor Pierre-Henri Imbert regrets that modifications aimed at diminishing the scope of the reservations with which he was familiar were possible only because of the "lack of objections on the part of the other contracting parties", even as he stressed that "it would, however, be desirable to encourage this procedure, which enables States to gradually adapt their participation in the treaty to the evolution of their national law, and which may constitute a transition to the total withdrawal of reservations".[328]

194. In practice, he seems to have been heard, at least in the European context. M. J. Polakiewicz cites a number of reservations concluded within the framework of the Council of Europe which were modified without arousing opposition.[329] For its part, the European Commission of Human Rights "showed a certain flexibility" as to the time requirement set out in article 64 of the European Convention on Human Rights:[330]

> "As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958-1959) (2 *Annuaire* 88-91) covers ... the law of 5 July 1962, which did not have the result of enlarging, a posteriori, the area removed from the control of the Commission".[331]

195. This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *limits* the scope of the reservation that the

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[328] Op. cit., footnote 322, p. 293. Curiously, J.-F. Flauss refers to this work (but to p. 163 — which says nothing of the kind) in stating his belief that "it is, it seems, accepted that a State party to a treaty can limit the scope of a reservation" ("le contentieux de la validité des réserve à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6 § 1", *R.U.D.H.* 1993, p. 301).

[329] Op. cit., footnote 322, p. 95; it is true that it seems to be more a matter of "statements concerning modalities of implementation of a treaty at the internal level" within the meaning of draft guideline 1.4.5 (see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 284-289) than of reservations as such.

[330] Article 57 since the entry into force of Protocol II: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

[331] William A. Schabas, commentary on article 64 in L. E. Pettiti, E. Decaux and P. H. Imbert, *La Convention européenne des droits de l'homme — commentaire article par article*, Economica, Paris, 1995, p. 932; italics in text; footnotes omitted. See the reports of the Commission in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann.* 2, p. 405, or *X c. Autriche* (req. No. 88180/78), *DR* 20, pp. 23-25.

Commission considered that it was covered by the law.[332] Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other contracting parties.[333]

196. The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Strasbourg Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification,[334] it proceeds differently if, following ratification, the law "goes no farther than a law in force on the date of the said reservation".[335]

197. The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

198. Following the highly disputable[336] position taken by the Strasbourg Court concerning the follow-up to its finding that the Swiss "declaration" made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,[337] Switzerland, after much hesitation, first modified its "declaration" — equated by the Court with a reservation, at least insofar as the applicable rules are concerned — so as to render it compatible with the judgement of 29 April 1988.[338] The "interpretative declaration" thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers "acting as a monitoring body for the enforcement of judgements of the Court".[339] These notifications do not seem to

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[332] Cf. the partially dissenting opinion of Judge Valticos in the *Chorherr c. Autriche* case: "If the law is modified, the divergence to which the reservation refers could probably, if we are not strict, be maintained in the new text, but it could not, of course, be strengthened" (judgement of 25 August 1993, series A, No. 266-B, p. 40).

[333] Cf. the successive partial withdrawals by Finland of its reservation to article 5 in 1996, 1998, 1999 and 2001 (http://conventions.coe.int/treaty/en/cadreprincipal.htm).

[334] See section II.B.2 below.

[335] Judgement of 25 February 1982, *Campbell et Cosans*, series A, vol. 48, p. 17, para. 37.

[336] See A. Pellet, "Second report on reservations to treaties", A/CN.4/477/Add.1, paras. 218-230. Paragraphs 198 to 201 of this report largely restate the ideas expressed in the second report (paras. 216-252).

[337] The Court held that "the contentious declaration does not meet two requirements of article 64 of the Convention (see footnote 330 above), so that it must be deemed invalid" (series A, vol. 132, para. 60) and that, since "there is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the declaration" (which, frankly speaking, was no less disputable), the Convention should be applied to Switzerland irrespective of the declaration (ibid.).

[338] Believing (correctly) that the Court's rebuke dealt only with the "penal aspect", Switzerland had limited its "declaration" to civil proceedings.

[339] J.-F. Flauss, op. cit., footnote 328, p. 298, footnote 7; see also William Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Ann. canadien de droit international* 1985, p. 48. For references to these notifications, see Council of Europe, *Série des traités européennes* (STE), No. 5, pp. 16-17, and Committee Resolution DH (89) 24 (Annexe), dated 19 September 1989.

have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.[340]

199. However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *Elisabeth B. v. Council of State of Thurgau Canton*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire "interpretative declaration" of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the Rome Convention[341] and in article 19 of the 1969 Vienna Convention.[342] On 29 August 2000, Switzerland officially withdrew its "interpretative declaration" concerning article 6 of the European Convention on Human Rights.[343]

200. Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

– The Swiss Federal Court's position is based on the idea that in this case, the 1974 "declaration" was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights);[344] and, above all:

– In that same decision, the Court stated that:

"While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant

[340] Some authors have, however, contested their validity; see Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *RGDIP* 1989, p. 314, and the works cited in the judgement quoted below (footnote 342) of the Swiss Federal Court, of 17 December 1992 (para. 6.b), and by J.-F. Flauss, op. cit., footnote 328, p. 300, as well as the position of that author himself; nonetheless, these objections dealt more with the background than with the very possibility of modifying a (quasi?-) reservation.

[341] See footnote 330 above.

[342] Extensive portions of the Federal Court's decision are cited in French translation in the *Journal des Tribunaux*, vol. I: *Droit fédéral*, 1995, p. 537. The relevant passages are to be found in paragraph 7 of the decision (pp. 533-537).

[343] See: http://conventions.coe.int/treaty/en/cadreprincipal.htm.

[344] The Special Rapporteur is of the view, however, that this does not affect the reserving State's right to modify its reservation in a manner that makes it permissible; moreover, in its preliminary conclusions of 1997, the Commission concluded that it was the reserving State which had the responsibility for taking action in the event of inadmissibility of a reservation (*Yearbook ... 1997*, vol. II (Part Two), para. 10). It does not seem necessary to reopen (or to settle) the issue at this stage.

State's commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.[345]

201. This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty's integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.[346] Furthermore, as has been pointed out, without this option the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): "States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, a fortiori, with future contracting parties"[347] that would have the advantage of knowing the treaty body's position regarding the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

202. Moreover, it was such considerations[348] which led the Commission to state in its preliminary conclusions of 1997 that in taking action on the inadmissibility of a reservation,[349] the State may, for example, modify its reservation so as to eliminate the inadmissibility;[350] obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

203. In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Frank Horn noted that of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, "47 have been withdrawn completely or partly ... .[351] In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete

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[345] See the decision mentioned in footnote 342 above, p. 535. Surprisingly, J.-F. Flauss, who does not cite this passage in his otherwise noteworthy commentary on the above-mentioned decision, maintains that "initially, in the context of current Convention law and international treaty law, it is difficult to agree that "at-fault" States have a right to modify their reservations, even if this right is limited to cases of partial impermissibility", op. cit. (footnote 328 above), p. 298.

[346] See Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, The Hague, 1988, p. 223; however, the author states that he does not know of any actual cases where an objection was withdrawn under such circumstances. The Special Rapporteur is also unaware of such behaviour, although it would be very appropriate.

[347] Flauss, op. cit. (see footnote 328 above), p. 299; the author's position here is (wrongly, in the Special Rapporteur's view) *de lege ferenda*.

[348] See *Yearbook ... 1997*, vol. II (Part Two), paras. 55-56; document A/52/10, paras. 86 and 141-144; and the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 241-251.

[349] See footnote 348 above.

[350] See the preliminary conclusions, (*Yearbook ... 1997*, vol. II (Part Two)), para. 10.

[351] Of these 47 withdrawals, 11 occurred during succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (cf. article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties); however, as the Commission has decided, all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice (cf. *Yearbook ... 1995*, vol. II (Part Two), para. 477 and *Yearbook ... 1997*, vol. II (Part Two), para. 221).

withdrawal".[352] This trend, while not precipitous, has continued in subsequent years, as demonstrated by the following examples:

- On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance;[353]
- On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961;[354] and
- On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, making it more specific.[355]

204. In all these cases (which provide only a few examples) the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

205. The Secretary-General's practice is not absolutely consistent, however, and in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations[356] and confines himself, "in keeping with the ... practice followed in similar cases", to receiving "the declarations in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged".[357] This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations — which raised no difficulty — and the making of (new)

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[352] Op. cit. (footnote 346 above), p. 226; however, these statistics must be viewed with caution. For example, the author actually mentions only one case in which successive partial withdrawals culminated in the total withdrawal of a reservation (p. 438): that of Denmark and the Convention relating to the Status of Refugees. In reality, (a) with one exception, the statistics are primarily for the total withdrawal of various reservations; and (b) one of the original Danish reservations was reformulated but retained (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000* (United Nations publication, Sales No. E.01.V.5) (hereinafter *Multilateral Treaties ...*), vol. I, chapter V.2, footnote 16).

[353] Ibid., vol. II, chap. XX.1, footnote 9; see also Sweden's 1996 "reformulation" of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (ibid., vol. I. n. 23) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention.

[354] Ibid., vol. II, chap. XIV.3, footnote 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (ibid., footnote 5) and Norway's replacement of a reservation in 1989 (ibid., footnote 6); in that case, however, it is not clear that the withdrawal was a partial one.

[355] Ibid., vol. I, chap. IV.8, footnote 24.

[356] See the fifth report on reservations to treaties (A/CN.4/508/Add. 3-4), paras. 279-325.

[357] Cf., for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties ...*, vol. I, chap. IV.12, footnote 6).

reservations".[358] This position seems to be confirmed by a memorandum dated 4 April 2000 from the United Nations Legal Counsel, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so" and extends the length of time during which parties may object from 90 days to 12 months.[359]

206. Not only is this position counter to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between "a modification of an existing reservation" and "a partial withdrawal thereof". In the case of the second type of communication, "the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations".

207. Thus, it is merely a question of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.[360] To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

208. Since this is not a new reservation but a limitation of an existing one, reformulated to bring the obligations of the reserving State more fully into line with those stipulated by the treaty, it is unlikely that the other contracting parties will object to the new formulation.[361] If they have adapted to the initial reservation, it is difficult to see how they could object to the new one, the effects of which, in theory, have been reduced. Just as a State cannot object to a pure and simple withdrawal, it cannot object to a partial withdrawal.

209. Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same juridical regime as a total withdrawal. In order to

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[358] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs* (ST/LEG/7/Rev.1), United Nations publication, Sales No. E.94.V.15, para. 206.

[359] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations (LA41TR/221 (23-1)). For further information on this time period, see the fifth report on reservations to treaties (A/CN.4/508/Add.4), paras. 320-324.

[360] Cf. draft guidelines 2.3.1 to 2.3.3 and the commentary thereon (*Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chap. VI.B.2.2., pp. 462-495).

[361] Nonetheless, they may certainly withdraw their initial objections which, like the reservations themselves, may be withdrawn at any time (cf. article 22, para. 2, of the Vienna Conventions of 1969 and 1986); see also para. 201 above.

avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,[362] it is better to refer here to a "partial withdrawal".

210. A single draft guideline should be able to take into account the alignment of the rules applicable to the partial withdrawal of reservations with those governing total withdrawal; to avoid any confusion, however, it would seem useful to specify what is meant by a partial withdrawal. This guideline could be worded as follows:

> ***2.5.11*** *Partial withdrawal of a reservation*
>
> *The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.*
>
> *The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.*

211. This definition is modelled as closely as possible on the definition of reservations resulting from article 2.1 (d) of the Vienna Conventions of 1969 and 1986 and draft guidelines 1.1 and 1.1.1.

212. On the one hand, while the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal and may, without any problem, implicitly (or explicitly of the Commission deems that to be clearer) refer to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5 bis, 2.5.5 ter], 2.5.6 [2.5.6 bis, 2.5.6 ter], 2.5.9, 2.5.10 and, perhaps, 2.5.3, on the other hand the difficulty lies in knowing whether the provisions of draft guidelines 2.5.4 ("Withdrawal of reservations held to be impermissible by a body monitoring the implementation of the treaty"), 2.5.7 ("Effect of withdrawal of a reservation") and 2.5.8 ("Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization") may be transposed to cases of partial withdrawals.

213. The trickiest case is probably one where a treaty monitoring body has found that the initially formulated reservation was not valid.[363] The *Belilos* case of the European Court of Human Rights and the action taken on that basis by the Swiss Federal Court in the *Elisabeth B.* case[364] may imply that if the monitoring body invalidated the reservation (or if its irregularity may be deduced from the reasoning it followed), the only possible solution is the withdrawal pure and simple of the reservation (for no modification may be made to a reservation said to be null and void ab initio); in this case, the provisions of draft guideline 2.5.4 may not be extended, mutatis mutandis, to a partial withdrawal; the latter may not be envisaged, and the only way for the reserving State or international organization to fulfil its obligations in that respect is by totally withdrawing the reservation.

214. But this reasoning is far from self-evident. It rests on the assumption that a monitoring body itself may take action as a result of finding a reservation impermissible. This is not the position taken by the Commission in the preliminary

[362] See paras. 205-207 above.

[363] Cf. draft guideline 2.5.4, para. 114 above.

[364] See paras. 199-201 above.

conclusions it adopted in 1997.[365] All that matters is that the author of the reservation respects the conditions of validity of the reservation; if it may do so by making a partial withdrawal, there is no reason it should be prevented from doing so — all the more so in that there is a risk of encouraging the pure and simple denunciation of the treaty, which is contrary to the often invoked principle of universality — while the modification of the reservation achieves the desired balance between the integrity of the treaty and the universality of participation (where the latter is a desired goal).

215. Thus, whereas the partial withdrawal is one of the means by which the State or international organization may fulfil its obligations if one of its reservations is found to be impermissible, the question arises as to whether it is useful to so specify in the Guide to Practice, and in what form. The Special Rapporteur sees three possibilities in this regard:

– It may suffice to specify it in the commentaries on draft guidelines 2.5.4 and/or 2.5.11; but the referral of clarifications to the commentary is often an easy option that is particularly questionable when it comes to drafting a guide to practice that must, as far as possible, provide users with answers to any legitimate questions they might have;

– A draft guideline could be modelled on the second paragraph of draft guideline 2.5.4, worded as follows:

> ***2.5.11 bis*** *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> *Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding.*

– Mention could be made, in the second paragraph of draft guideline 2.5.4, of the possibility of a partial withdrawal; but to proceed thus for this guideline alone, without doing the same for all the others which apply to both partial and total withdrawals, does not seem, a priori, very logical; and yet it does seem essential to individualize draft guideline 2.5.11.

216. The Special Rapporteur nevertheless prefers a solution of this type, provided that it does not lead to the elimination of draft guideline 2.5.11. This objective may be attained by combining draft guidelines 2.5.4 and 2.5.11 bis *and* by moving this single draft guideline to the end of section 2.5 of the Guide to Practice. This guideline might read as follows:

> ***2.5.X*** *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> *The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.*

[365] See footnote 348 and para. 202 above.

Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.

217. There should be little hesitation with regard to the effect of the partial withdrawal of a reservation, for it cannot be compared to that of a total withdrawal, nor can it be held that "the *partial* withdrawal of a reservation entails the application of a treaty *as a whole* in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation".[366] Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other contracting parties; but not "as a whole" since, hypothetically, the reservation (in a more limited form, of course) remains.

218. Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,[367] even if those objections had been accompanied by the opposition of the entry into force of the treaty with the reserving State or international organization.[368] There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them, and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them;[369] they cannot be required to do so, however, and they may perfectly well maintain their objections if they deem it appropriate.[370]

219. The only real question in this regard is to know whether they must formally confirm their objections or whether the latter must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, for, as indicated above,[371] there seems to be no case where the partial withdrawal of a reservation has led to a withdrawal of objections, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.[372] This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; a priori, the objections that were made to it rightfully continue to apply as long as their authors do not withdraw them.

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366 Cf. draft guideline 2.5.7; see para. 184 above.

367 Cf. draft guideline 2.5.7, ibid. ("... whether they had accepted or objected to the reservation").

368 Cf. draft guideline 2.5.8; see para. 184 above ("The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization").

369 See para. 201 and footnote 361 above.

370 Even though they may not take the opportunity offered by the partial withdrawal of a reservation to formulate new objections; cf. para. 208 above.

371 Footnote 346.

372 See footnote 355 above: the objections of Denmark, Finland, Mexico, Norway, the Netherlands or Sweden to the reservation formulated by the Libyan Arab Jamahiriya were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties* ..., vol. I, chap. IV.8, pp. 245-250.

220. It seems essential, then, to devote a specific draft guideline to the effect of a partial withdrawal of a reservation. Such a guideline could be presented as follows:

2.5.12 Effect of a partial withdrawal of a reservation

The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them.

221. Although the wording of the second sentence of this guideline does not seem to call for any particular explanation, it may be useful to indicate that the wording of the first sentence is based on the terminology used in article 21 of the Vienna Conventions,[373] without entering into substantive discussion of the effects of reservations and objections made to them.

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[373] Cf. article 21, para. 1: "A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation."